



Multistate Tax Commission Memorandum

States Working Together Since 1967 . . . To Preserve Federalism and Tax Fairness

To: Executive Committee
From: Frank Katz, General Counsel
Date: January 13, 2005
Subject: Update on Amicus Briefs and Cases of Note

AMICUS BRIEF FILED

Richards v. Prairie Band Potawatomi Nation. The Tenth Circuit ruled that the Kansas gasoline tax, which is imposed on distributors receiving gasoline off reservation, was nevertheless preempted by implication by federal law under the *White Mountain Apache Tribe v. Bracker* balancing-of-interests test when sold to a tribal gas station on the reservation. U.S. Supreme Court precedent holds that the implied-preemption doctrine, which allows a balancing of state, federal and tribal interests, does not apply to transactions that occur off the reservation. If the Tenth Circuit's position is upheld, virtually any tax imposed on an off-reservation transaction may suddenly become nontaxable if the item is subsequently sold to a tribal member on the reservation.

Kansas filed its petition for Certiorari on November 5th. That would have made the response due on December 10th at which time any *amicus curiae* brief would also have been due. On November 15th the tribe filed a waiver of response, perhaps to forestall the filing of any amicus briefs in support of Kansas. Indeed, on November 17th, Kansas's Petition was distributed to the Justices and placed on the December 3rd Conference Calendar for the Justices to decide whether to grant certiorari and hear the case. This meant that any amicus brief had to be filed quickly in order to get it to the Justices before they made their fateful decision. The Commission filed its amicus brief one week later on November 24th and on November 26th the Court asked the tribe to file a response. That response is now due on January 26th.

Hammond v. Coeur d'Alene Tribe. The Ninth Circuit held that the legal incidence of Idaho's gas tax is on the retailer and that the federal Hayden-Cartwright Act did not provide the explicit federal authorization necessary to allow the state to impose the tax on a tribal gas station on the reservation. The Idaho Supreme Court had earlier held in the *Goodman Oil* case that the legal incidence of the Idaho fuels tax was on the retailer, striking down the tax on a reservation tribal retailer. In response, the Idaho legislature had amended its gas tax statute to state explicitly its intention that the legal incidence of the tax be on the distributor. It made this amendment in accordance with clear language from the U.S. Supreme Court in *Oklahoma Tax Comm'n v. Chickasaw Nation* that if the state is blocked by tribal sovereignty in imposing tax, it is free to amend its statutes to place the legal incidence where that won't be a problem. The Hayden-Cartwright Act explicitly authorizes states to impose tax on "licensed traders" selling gasoline on "military and other reservations." Since the only mention of "licensed traders" in federal law is to

licensed Indian traders selling on tribal reservations, it would appear unmistakable that the federal law authorizes states to impose gas tax on reservation sales by a tribal retailer, at least to non-Indians.

The Commission filed its brief *amicus curiae* on December 22nd. The brief focused on the Ninth Circuit's rejection using federal, rather than state, law of the Idaho Legislature's amendments to the fuels tax placing the incidence of the tax on the distributor. The tribes' response, filed at the same time, focused on many of the same quotations from the Ninth Circuit decision. North Dakota also filed a brief *amicus curiae* that was joined by 15 other States. The case was placed on the January 21st Conference Calendar.

Director, Division of Taxation v. Lanco, Inc. This case is currently before the New Jersey appellate court. The MTC filed a motion for permission to file an amicus brief and the brief in August, 2004. On November 24, 2004 the court granted our motion for the filing of the brief. The taxpayer has now filed a motion to be permitted to file a response to the MTC amicus brief.

AMICUS BRIEF REQUESTS

General Motors v. Franchise Tax Board The California Court of Appeals held that the receipts from short-term investments, mainly repurchase agreements, that represent the principal invested are not receipts from sales and thus do not go into the denominator of the sales factor. Only the interest portion of the receipts goes into the denominator. The Court of Appeals also held that tax credits from one of the corporate members of the unitary business that is part of the combined report may be taken only by that corporate member, not by the combined group as a whole. The California Supreme Court has now agreed to hear the case. Staff is preparing a brief *amicus curiae* that will be filed by the end of February. It is expected that the brief will cover both issues.

RECENT CASES OF INTEREST

Cases Pending Decision in the Supreme Court

Granholm v. Heald, S. Ct. No. 03-1116, and ***Swedenburg v. Kelly***, S.Ct. No. 03-1274, discussed earlier, involved whether states could bar out-of-state wineries from shipping wine directly to consumers. The cases were argued on December 7th. It appeared to all the commentators that the Court was not looking favorably on the states' position.

Sherrill, N.Y. v. Oneida Indian Nation of New York, S.Ct. No. 03-855, discussed earlier, concerns whether a New York city may impose its property tax on parcels owned by the Oneida Indian Nation of New York on what was their reservation. The 2nd Circuit Court of Appeals said the state could not tax. It is set for oral argument on January 11th.

Federal Communications Commission v. Brand X Internet Services, S.Ct. No. 04-281, and ***National Cable & Telecommunications Ass'n v. Brand X Internet Services***, S.Ct. No. 04-277. The Court granted certiorari on December 3rd. At issue is cable

broadband Internet access service is an interstate information service, a cable service, a telecommunications service or some combination of all three. The Court denied certiorari the same date in *National League of Cities v. Federal Communications Commission*, S.Ct. No. 04-460.

Other Recent Decisions

A&F Trademark Inc. et al. v. Tolson, North Carolina Court of Appeals, December 7, 2004, affirmed that North Carolina can require these intangible holding companies to pay income tax on royalties for use of their trademarks paid by various retail affiliates in North Carolina, and that *Quill* does not impose a physical presence requirement for income and franchise tax. The decision contains a pointed dismissal of the basis of the New Jersey Tax Court decision in *Lanco*.

In the Matter of Sherwin-Williams The New York Appellate Division (the intermediate appellate court) affirmed the Division of Tax Appeals holding that the state Division of Taxation was correct in requiring that Sherwin-Williams file a combined report with its intangible holding companies to prevent distortion.